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In The

Supreme Court of the United States

October Term, 1994

THE PRIMATE AND BISHOPS' SYNOD OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Petitioner,

v.

THE RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF JAMES ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), ORTHODOX CHURCH IN AMERICA, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA, ANTIOCHIAN ORTHODOX CHRISTIAN ARCHDIOCESE OF NORTH AMERICA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR CERTIORARI

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

MOTION OF PRESBYTERIAN CHURCH (U.S.A.) *ET AL.* FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Presbyterian Church (U.S.A.), the Protestant Episcopal Church in the United States of America and other churches have been losing parishes to breakaway congregations because of the refusal by lower courts to enforce the denomination's right to retain local church property. This has come about because of this Court's decision fifteen years ago that courts could use "neutral principles of law" to decide ecclesiastical disputes over ownership of church property. But those principles have proved in many instances to be "neutral" in favor of

congregationalizing hierarchical polities, contrary to the church's own self-definition.

Repeatedly, lower courts have construed clear and express provisions in church law prohibiting the alienation of church property without the consent of hierarchical authorities as being mere moral and spiritual guidance without legal force or effect on temporal control of property. The instant case is just such an example of judicial disregard of explicit church law and provides this Court an opportunity to clarify and correct the lower courts' (mis)understanding of the right of hierarchical churches to control their subordinate entities in property as in all other matters.

Pursuant to Rule 37 of this Court, *amici curiae* James Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Orthodox Church in America, National Council of Churches of Christ in the U.S.A., Greek Orthodox Archdiocese of North and South America, Antiochian Orthodox Christian Archdiocese of North America, General Conference of Seventh-day Adventists, and Christian Legal Society move for leave to file the attached brief *amici curiae*.

Petitioner the Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia consented to the filing of this brief *amici curiae*, but respondents the Russian Orthodox Church of the Holy Resurrection, *et al.*, Dale Harger, Counsel, refused to consent. Petitioner's letter of consent has been lodged with the Court.

Because of their victimization in church property disputes and because of their long involvement in issues of religious liberty, these *amici curiae* are able to provide the

Court a unique and seasoned perspective on how the courts in a number of states have trampled on *amici's* protected autonomy over church governance. *Amici* have not merely repeated the arguments made in the petition, but rather have explained their church polity and how the present state of the law fosters unwarranted government intrusion upon church autonomy, as this case and too many others demonstrate.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*

The Presbyterian Church (U.S.A.), the Protestant Episcopal Church in the United States of America and other churches have been losing parishes to breakaway

congregations because of the refusal by lower courts to enforce the denomination's right to retain local church property. This has come about because of this Court's decision fifteen years ago that courts could use "neutral principles of law" to decide ecclesiastical disputes over ownership of church property. But those principles have proved in many instances to be "neutral" in favor of congregationalizing hierarchical polities, contrary to the church's own self-definition.

Repeatedly, lower courts have construed clear and express provisions in church law prohibiting the alienation of church property without the consent of hierarchical authorities as being mere moral and spiritual guidance without legal force or effect on temporal control of property. The instant case is just such an example of judicial disregard of explicit church law and provides this Court an opportunity to clarify and correct the lower courts' (mis)understanding of the right of hierarchical churches to control their subordinate entities in property as in all other matters.

The *amici curiae* joining this brief are religious denominations and organizations committed to the principles of religious liberty and governmental non-interference in religious affairs.[1] Because of that commitment, each of the *amici* is deeply disturbed by the judgment of the Massachusetts state courts in this case, under which a historically hierarchical church has been transformed into a congregationally controlled organization with respect to church property, in violation of both the traditions and governing documents of the larger church and of the particular parish.

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[1] The precise interest of each *amicus* is set forth in the Appendix to this brief.

Amici include religious denominations that are structured in a hierarchical manner similar to that of petitioner and that have been ravaged by courts below due to the lack of clear direction from this Court in this area. *Amici* also include a civil rights organization dedicated to the advocacy of strong protection for the first of our civil liberties, religious freedom. The *amici* are thus in a position to suggest to this Court a significant point that appears to have escaped the attention of the Massachusetts courts: theological convictions have a direct and powerful bearing on the structures and forms of ecclesiastical governance. Notwithstanding the important differences among the *amici* – indeed, precisely because of these significant theological differences – all of the *amici* have a strong interest in keeping the government out of affairs that are beyond its jurisdiction and literally none of its business.

ARGUMENT

This case vividly exemplifies a disturbing trend among state courts that are deciding disputes over church property in the light of the Religion Clause of the First Amendment. The problem concerns religious bodies that are organized along "hierarchical" lines, that is, where the local religious congregation "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722 (1871). As the Petition for Certiorari details, such hierarchically organized religious bodies have been unable to rely on the courts to provide consistent enforcement of their chosen structures. State courts have issued conflicting decisions as to whether the property belongs to the national church or to a breakaway local congregation, and far too often they have awarded

the property to the breakaway congregation in violation of the governance structure and arrangements of the church.

As set forth below and in the Petition, the inconsistency has arisen partly because courts adhere to two different approaches to resolve intra-church property disputes: the "polity" approach, under which the court identifies whether the religious body is hierarchically or congregationally organized and then defers to the decision of the authoritative body under each of those structures; and the "neutral principles" approach, under which the court applies principles of trust, property, or other law to the deeds, church documents, and other relevant materials in the intra-church dispute. In *Jones v. Wolf*, 443 U.S. 595, 602 (1979), this Court held that a state may adopt either of these "approaches for settling church property disputes so long as it involves no consideration of doctrinal matters." However, as detailed below, even courts applying the "neutral principles" approach have failed to reach consistent results concerning hierarchically organized churches.

Amici agree that the issues presented in this case cannot be permitted "to ripen further before resolution by this Court," but constitute "a grave constitutional violation." Pet. 23. We also agree with the Petition's contentions of law: at the very least, this Court should give guidance to state courts applying the "neutral principles of law" approach; but if the self-understanding of a religious community cannot be respected under that approach, the Court should disapprove of it and reverse the holding in *Jones v. Wolf*.

To this Court's deliberation on the Petition *amici* bring the perspective of other denominational victims of lower court adventurism in church property disputes. Inconsistent decisions among state courts of last resort

present an intolerable situation for hierarchically organized churches and therefore make review by this Court necessary. *See* Sup. Ct. R. 10.1(b). Questions of church structure and polity, for many religious bodies, involve far more than simple convenience or efficiency: they rest on deeply held theological and doctrinal beliefs that are protected by the Religion Clause from government interference.

This case exemplifies the chief reasons why courts have failed to respect the arrangements of hierarchically organized religious bodies (even arrangements clearly reflected in the body's governing documents): a tendency to ignore those documents in favor of purely "secular" instruments such as deeds, and a misuse and misreading of other evidence concerning the dealings between a national church and a local congregation. Accordingly, this case is an apt vehicle for this Court to clarify the law and protect the constitutional rights of religious groups.

A. The Decision Below And Decisions Like It Seriously Burden Religious Freedom By Interfering With Doctrinally-Based Decisions Concerning Church Structure And Governance

Unlike many other collective entities, churches do not simply choose their organizational structures for reasons of efficiency or bureaucratic ease. Instead, such structure (or "polity") is, in many cases, "an expression of deeply held convictions of a faith community about their understanding" of the nature of their faith. Pet. 25 n.18. As a consequence, when courts unthinkingly override the polity of a hierarchical body, the community self-understanding that is violated is a *religious* one. For that reason, this Court has long recognized that the Free Exercise Clause must guarantee religious organizations "power to

decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see also Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (court may not "lend its power to one or the other side in controversies over religious authority or dogma"). We wish to illustrate this point not only with respect to the Russian Orthodox Church Outside Russia, but also with respect to two other hierarchically organized churches, the Protestant Episcopal Church in the USA (hereafter "the Episcopal Church") and the Presbyterian Church (U.S.A.) (or the "PC(USA)").[2]

The structure of the Russian Orthodox Church Outside Russia – hierarchical, with control by bishops over both discipline and property – is not unlike that of the Episcopal Church, which (like other members of the world-wide Anglican communion) is also hierarchical. That structure is reflected explicitly in provisions of church canon law concerning both matters of faith and matters of property and other business. The canon law states that "[a]ll real or personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for [the Episcopal] Church and the Diocese

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[2] These bodies, both of which are members of the National Council of Churches of Christ in the U.S.A. and will be adversely affected if the judgment below and others like it are allowed to stand, together count more than 6 million members. *See Yearbook of American and Canadian Churches* 256, 258 (1994) (listing 2.5 million members in Episcopal Church and 3.7 million in PC(USA)). When other similarly organized churches are considered, the importance of this issue in sheer numbers is apparent.

thereof"; a local parish or mission may exercise authority over the property only "so long as [it] remains a part of, and subject to, th[e] Church and its Constitution and Canons." *Constitution and Canons for the Government of the Protestant Episcopal Church in the USA*, Title I, Canon 7, Section 4, at 34 (1985). Moreover, no local parish body "authorized by Civil or Canon law to hold, manage, or administer real property for any Parish . . . shall encumber or alienate [the property] without the written consent of the Bishop and Standing Committee of the Diocese." *Id.*, Title I, Canon 7, Section 3. The same trust provisions and limits on local parish authority apply to "dedicated and consecrated" churches and chapels. *Id.*, Title II, Canon 7, Sections 1-4, at 56.

In both the Orthodox and the Episcopal churches, the placing of authority in the bishop reflects the theological notion of "apostolic succession," or the "historic episcopate" – the continuity between the first apostles and today's church. Indeed, the Orthodox and Episcopal churches, in ecumenical discussions on the meaning of their common "episcopal" polity, agree that "[t]he apostolicity of the Church is manifested in a particular way through the succession of bishops. This succession is a sign of the unbroken continuity of apostolic tradition and life." *Dublin Agreed Statement of 1984*, § 17, *quoted in On Being a Bishop: Papers on Episcopacy from the Moscow Consultation* 43 (R. Wright ed. 1993). As the Petition for Certiorari (at 25 n.18) notes, "if one believes that Christ's authority and teaching pass down through apostolic succession, then one does not let a congregation take votes on these matters."

Moreover, to those bodies organized on episcopal terms, the "historic episcopate" is an expression of the unity of the church. These bodies take seriously the statement of St. Ignatius in the second century: "Take care,

then, to partake of one Eucharist; for one is the flesh of our Lord Jesus Christ, and one the cup to unite us with his blood, and one altar, *just as there is one bishop* assisted by the presbyter and deacons." St. Ignatius, *Smyrna* 7,1, *reprinted in* R. Wright, *On Being a Bishop, supra, id.* at 41. Thus, the 1979 *Book of Common Prayer* for the Episcopal Church states that the bishops "carry on the apostolic work of leading, supervising, and uniting the Church." *Book of Common Prayer* 510 (1979); *see also id.* at 517, 855 (admonishing newly ordained bishops to "guard the faith, unity, and discipline of the whole Church").

The polity of the Presbyterian family of religious bodies similarly rests on theological affirmations. The largest Presbyterian denomination, the Presbyterian Church (U.S.A.), explicitly provides for the authority of higher tribunals over matters of both faith and property. The PC(USA) *Book of Order* states that "[a]ll property held by or for a particular church," wherever legal title is lodged, "is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)." *Constitution of the Presbyterian Church (U.S.A.) – Part II: Book of Order* G-8.0201 (1994). Consequently, "[w]henever property of, or held for, a particular church . . . ceases to be used by that church . . . in accordance with [the PC(USA)] Constitution," such property shall be held, used, applied, transferred, or sold as provided by the presbytery." *Id.* G-8.0301. And a local church seeking to sever its ties with the denomination may do so "only by constitutional action on the part of the presbytery." *Id.* G-8.0601.

The distinctive Presbyterian form of governance likewise is tied to deep religious tenets. The General Assembly, the highest ruling body of the PC(USA), has emphasized that

> [t]he basis of Presbyterian polity is theological. Our polity is not just a convenient way of getting things done; rather, it is the ordering of our

> corporate life which expresses what we believe. The connection between faith and order is inseparable. At its heart, the polity of our church expresses our Reformed theology. What we do and the way we do it is an expression of how we understand our faith.

195th General Assembly of the Presbyterian Church in the United States of America, *Historic Principles, Conscience, and Church Government* (1983), *quoted in* McCarthy, *The Emerging Importance of Presbyterian Polity*, in *The Organizational Revolution: Presbyterians and American Denominationalism* at 279, 302 (M. Coalter, J. Mulder & L. Weeks eds. 1992).

The Presbyterian polity – with tribunals that are representative in nature exercising authority over subordinate entities – stems back to the teachings of John Calvin and the "Ecclesiastical Ordinances" he instituted in Geneva. After setting forth the various ministerial offices, Calvin described this "order of church government as delivered to us in the pure word of God, and . . . instituted by Christ." 2 John Calvin, *Institutes of the Christian Religion* 327 (H. Beveridge trans. 1845); *see generally id.* Book IV, chs. III-V. The Westminster Assembly of 1643 to 1645, whose creeds and confessions have directed much of Presbyterian life for centuries, stated that "[i]t is lawful, and agreeable to the Word of God, that the church be governed by several sorts of assemblies, [including] presbyteries and synods" and that "appeales be made from the inferior to the superior respectively." *Westminster Assembly Directory for Church Government, reprinted in Paradigms in Polity: Classical Readings in Reformed and Presbyterian Church Government* at 263, 268 (D. Hall & J. Hall eds. 1994).

In setting forth these doctrinal bases for the hierarchical organization of certain religious bodies, we *do not* suggest that courts must interpret religious doctrines in

order to find that a group has such a hierarchical polity. Cf. *Jones*, 443 U.S. at 602, 604 (forbidding such inquiries); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449-450 (1969) (same). The hierarchical nature of these communities is evident from the specific secular terms in the governing documents as well as the overall structure of those documents. We cite the doctrinal bases only to emphasize that to disregard and trample upon a hierarchical polity bars a group from following its "sincere religious beliefs" and thus imposes a "significant" burden on the free exercise of religion. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391-392 (1990).

B. The Lower Courts Are In Confusion As To How To Resolve Church Property Disputes Within Hierarchically Organized Religious Bodies

In spite, however, of the clear language cited above in the organic documents, hierarchically organized churches have been unable to rely on the courts to provide consistent enforcement of the form of organization they have chosen. This case dramatizes the problem with respect to Orthodox churches (here, the Russian Orthodox Church Outside Russia). And cases involving the Presbyterian Church (U.S.A.) and its predecessors[3] and the Episcopal Church present the same inconsistency and uncertainty. A number of courts have refused to enforce the hierarchical polity of these bodies. *See* cases discussed

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[3] The PC(USA) was formed in 1983 by the reunion of the United Presbyterian Church in the USA (UPCUSA) and Presbyterian Church in the US (PCUS). Several previous cases discussed here involved the UPCUSA, which had similar provisions in its *Book of Order* to those of the PC(USA).

in the Petition for Certiorari at 16-17 (Presbyterian churches), 18-20 (Episcopal churches).[4]

As the petition shows, some courts have recognized the authority of higher church bodies over church property. *See* cases cited in Petition at 15 (Orthodox churches), 17 (Presbyterian churches), 20-21 (Episcopal churches). The upshot of this chaotic state of the law is that these nation-wide denominations, and others with hierarchical structures, now face a "patchwork" of conflicting decisions in various states, in an area that calls out for certainty so as to avoid chilling First Amendment rights. This Court's intervention is needed. Sup. Ct. R. 10.1(b).

Several years ago, a survey of the law governing church property disputes since *Jones v. Wolf* concluded that the cases have been shot through with "inconsistency and unpredictability." William G. Ross, *The Need for An Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 St. Louis U.L.J. 263, 305 (1987).[5] As Professor Ross noted, the *Jones* decision prompted many critics to suggest that the Court needed to give "clearer guidance to lower courts" and thus "that the Court would need to re-visit the question of church property dispute resolution in the near future." *Id.* at 265. For fifteen years now, however, "the state courts have navigated the treacherous waters of church property disputes without additional guidance from" the

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[4] We discuss the specific reasons for the failure to give consistent respect to hierarchically organized churches *infra* in part C (pp. 14-19).

[5] While we disagree with that article's ultimate judgment that "neutral principles" analysis should be applied exclusively (*id.* at 305-316), we agree with its characterization of the uncertainty in the existing law and its recommendation that, if courts are to apply "neutral principles," they should do so in a consistent manner.

Court. *Id.* The results – that "inconsistency and unpredictability abound" – are even clearer, and more distressing, than in 1987.

Moreover, the consequences are important to religious bodies throughout the United States:

> The law would better serve the needs of both national denominations and their local congregations if both sides were able to make more accurate predictions about the outcome of property disputes. National churches, for example, could better evaluate the consequences of controversial pronouncements on social and doctrinal issues. Members of congregations, in turn, could better measure the prudence of voting to withdraw from the parent body.

Id. at 305.

In short, there is an urgent need for this Court, a decade and a half after *Jones v. Wolf*, to return to this area and provide guidance on the proper means of resolving church property disputes. Moreover, the primary problem in this area is that identified by the Petition for Certiorari: the tendency of state courts to disregard the hierarchical structure of a religious body – *even as explicitly set forth in the governing documents of the church* – and to award property to a breakaway local congregation.

C. The Decision In This Case Exemplifies The Means By Which Courts Have Overridden The Structure Of Hierarchical Religious Bodies, In Violation Of This Court's Directions

This case presents a textbook example of the means that state courts have used to disregard the hierarchical structure of a religious body and impose a congregational polity on it in violation of its deeply held religious tenets. Therefore, this case presents an apt vehicle for correcting the recurring errors and confusion in this area.

The Massachusetts Appeals Court (whose reasoning was adopted by the Supreme Judicial Court, Pet. App. 3a) recognized that the explicit language of both the general Church documents and the parish by-laws "provide considerable force to the Church's position" that it "had control over the Parish's property," especially the church building and real estate. Pet. App. 8a.[6] Nevertheless, the court overrode these documents on the basis of parol evidence, "particularly of the considerable movement in and out of the Church by individual parishes who took with them their own property without claim by the Church." Pet. App. 11a.[7]

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[6] As the Appeals Court noted, these explicit provisions state among other things that the diocesan bishop "administers and disposes of diocesan and monastic property and supervises all other church property in the diocese, in accordance with the 41st Apostolic canon: 'We command that the Bishop have authority over the property of the church.' " Regulation 47-18 (quoted at Pet. App. 8a; reprinted at Pet. App. 34a). The parish by-laws provide that "church property" includes "[t]he church building with all its appurtenances" (By-Laws § 44(a), Pet. App. 42a); and that "[t]he sale of church real estate, its alienation, exchange or cession for building purposes, shall be effected subject to the authorization of the Bishops' Synod." By-Laws § 53, Pet. App. 44a. Any amendment of the By-Laws and any closing of the parish are likewise subject to the approval of the Bishops' Synod. By-Laws §§ 54, 56, Pet. App. 44a.

[7] We agree with petitioner (Pet. 8 n.3) that the state appellate courts should have conducted an independent review of the trial judge's conclusion that the Church was "congregational" with respect to property issues, rather than accepting that conclusion as "not clearly erroneous" (Pet. App. 2a; Pet. App. 9a, 11a). Permitting questions with such import for the Religion Clause to be left to the discretion of trial courts – or presumably in some cases, juries – is a recipe for the kind of inconsistency that marks this area. The very purpose of the independent appellate review mandated in *Bose Corp. v. Consumer's Union,*

In addressing the following errors in the state court decisions, we agree with the legal arguments presented by petitioner in response to those errors. First, at the very least, this Court should instruct state courts applying the "neutral principles of law" approach (permitted in *Jones v. Wolf*) that they must give effect to the language and structure of the governing documents of the general church. As we will show, to fail to give effect to such documents violates the clear teachings of this Court on this important issue of federal law. *See* Sup. Ct. R. 10.1(c). More broadly, however, the Court should reject the use of "neutral principles" of law, at least when they are applied to override the hierarchical nature of a church as is shown in the governing documents.

1. ***Ignoring the Church's Organic Documents.*** The primary reason why some state courts have failed to respect the hierarchical polity of religious bodies is precisely what happened in this case: the courts ignore the governing church constitutions and canons in favor of a focus on purely secular documents such as property deeds, or on ill-defined inquiries into a "course of conduct."

In *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988), for example, the Kentucky Supreme Court simply refused to follow the provision of canon law, as well as an instrument of donation from the local parish, that prohibited encumbrance or alienation of church property without the bishop's consent. *Bjorkman*, 759 S.W.2d at 586 (dismissing both provisions as "of moral value *only* and without legal effect"). This refusal was essential to the court's conclusion that the local parish

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466 U.S. 485, 499 (1984), and *New York Times v. Sullivan*, 376 U.S. 254, 284-286 (1964), is to ensure consistent protection of First Amendment rights.

"was at all times in control of its temporal affairs" such as property (*id.* at 587). Likewise, in *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, 1325, *cert. denied*, 474 U.S. 887 (1985), the court looked solely at provisions in the deeds in awarding property to the local church, and dismissed provisions in the *Book of Order* as merely "a means of overseeing the *spiritual* development of member churches" (emphasis in original).

The same splitting of a hierarchical church into "spiritual" and "temporal" authority appears in this case. The Supreme Judicial Court affirmed the finding that "although [the general Church] and the defendant parish were hierarchical in matters of faith and polity, the defendant parish was congregational in terms of property ownership." Pet. App. 2a.

By contrast, as discussed in greater detail below, courts that have given effect to the provisions in the general church constitution or canons have found that these provisions gave the general church control over matters of property as well as matters of faith and doctrine.

Undoubtedly, one factor in determining whether a court gives effect to provisions in the larger church's governing documents is whether the court applies the "polity" approach or the "neutral principles" approach. Courts that seek to determine the nature of the polity in order to defer to the authoritative intra-church resolution have uniformly concluded that the Orthodox, Episcopal, and Presbyterian churches are hierarchical, based on the specific language and overall structure of the organic documents. *See, e.g., Draskovich v. Pasalich*, 151 Ind. App. 397, 280 N.E.2d 69 (1972) (Serbian Eastern Orthodox Church); *Tea v. Protestant Episcopal Church*, 96 Nev. 399,

610 P.2d 182 (1980) (Episcopal Church); *Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App. 105, 384 N.W.2d 92, 94-95 (1986) (UPCUSA). The only cases in which courts have disregarded language in the organic documents are cases applying the "neutral principles of law" approach. Thus, some confusion is almost guaranteed to remain as long as this Court continues to permit states to "adopt *any* one of various approaches for settling church property disputes." *Jones*, 443 U.S. at 602 (emphasis in original; quotation omitted). For that reason, we agree with the Petition that this aspect of *Jones v. Wolf* should be overruled and the "polity" approach be adopted uniformly.

However, even if this Court determines that the "neutral principles of law" approach remains appropriate, the Court must correct the state courts' lack of respect for governing church documents, because that lack of respect also has undermined consistent application of the neutral principles approach. Although *Jones v. Wolf* instructed courts applying neutral principles to look to "the provisions in the constitution of the general church concerning the ownership and control of church property" (443 U.S. at 603), state courts since *Jones* – including the Massachusetts courts here – have failed to follow that directive consistently. This Court's review is necessary to ensure that the analysis prescribed in *Jones* is followed. *See* Sup. Ct. R. 10.1(c).

For example, the *Bjorkman* decision dismissed the Episcopal Church constitution and canons under the neutral principles analysis (759 S.W.2d at 586), just as the Massachusetts courts here overrode the governing documents of the Russian Orthodox Church Outside Russia. On the other hand, several other cases applying "neutral principles" to Episcopal parishes have enforced those

provisions. *See, e.g., Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 821-822, 620 A.2d 1280, 1292 (1993); *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 105-107 (Colo. 1986); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, 24 (1980).[8]

Likewise, several courts applying the "neutral principles" analysis to Presbyterian documents have refused to give effect to provisions in the *Book of Order*, particularly the provision that prohibits the selling or encumbering of church property without approval of the Presbytery. *See, e.g., Presbytery of Beaver-Butler, supra; Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 474 (Mo. 1984) (rejecting that provision as inapplicable); *York v. First Presbyterian Church of Anna*, 130 Ill. App. 3d 611, 474 N.E.2d 716 (1984) (simply ignoring that provision). But in *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore*, 296 Md. 573, 464 A.2d 1008, 1016-1017 (1983), the court, applying "neutral principles" analysis, enforced the provision prohibiting sales or encumbrances and thus awarded the property to the denomination.

Even the explicit trust and property provisions adopted by some religious bodies and set forth above (pp. 6-10) have been cast into doubt by the decision and reasoning of the Massachusetts courts in this case. The regulations of the general Church and the by-laws of the Holy Resurrection Parish are quite explicit in providing that the diocesan bishop "disposes of" and "supervises" church property, and that any alienation of church property, as well as any amendment of the by-laws, must be

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[8] Each of these cases also concluded that the express canon law provisions reflected or confirmed the "established customs, practices and usages" of the Church providing for general church control over property. *Mote*, 716 P.2d at 105 n.15; *Graves*, 417 A.2d at 24; *accord Rector, Wardens and Vestrymen*, 620 A.2d at 1292.

approved by the Bishops' Synod. *See supra* p. 13 n.6. While admitting that these provisions have "considerable force" (Pet. 8a), the Massachusetts courts overrode them on the basis of vague testimony concerning the "course of conduct" in this Church and other Orthodox bodies. (We discuss this "course of conduct" testimony in the next section.) Given the propensity that courts have already shown to limit church constitutions and canons to merely "moral" exhortations or "spiritual" matters, the decision and reasoning in this case will likely encourage further disregard of religious bodies' organic documents.

2. ***Misreading of Evidence Concerning "Course of Conduct."*** The state court decisions in this case also exemplify a second recurring source of confusion and error: the tendency of some courts to elevate vague and selective testimony about the "course of conduct" in a religious body above the governing documents.

The Appeals Court here relied heavily on open-ended testimony about a "crazy quilt" of property ownership in the prerevolutionary Russian Orthodox Church, including ownership by "tradesmen, nobles, and the Tsars." Pet. App. 9a. The Petition, however (at 29 n.24), points out the obvious irrelevance of government ownership of churches under American conditions of disestablishment. More to the point, the Appeals Court noted that the parish paid for and managed the property (Pet. App. 9a), but it ignored other elements of the relationship between the parish and the general Church. This selective examination of the dealings between the parties – selectively favoring the claim of the local congregation – is, again, typical of courts that disregard hierarchical church polities. In *Bjorkman*, for example, the majority disregarded evidence that the local parish "enjoyed the benefits of membership in the PECUSA for many long years," including insurance on the church property purchased,

participation of the parish clergy in the denominational pension plan, and regular "help and advice" from the diocesan bishop. *Bjorkman*, 759 S.W.2d at 588 (Stephens, C.J., dissenting).[9]

* * *

Even under a proper application of "neutral principles of law," courts must give effect to church constitutions and canons (*Jones*, 443 U.S. at 603); and this Court should at least reaffirm that directive, since several state courts have disregarded it. But we agree with petitioner that the repeated failure of some courts applying "neutral principles of law" to give effect to clear provisions embodying a hierarchical polity places that whole approach on shaky ground. The approval of "neutral principles" in *Jones v. Wolf* rests on the premise that "[t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency." 443 U.S. at 603. The state courts of last resort have failed to give consistent assurance that this premise will

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[9] Similarly in this case, the Massachusetts Appeals Court relied heavily on testimony that other parishes had been allowed to leave the denomination and "[t]ake with them their property without claim by the Church" (Pet. App. 11a). This conclusion squarely conflicts with *Calvary Presbyterian Church, supra*, in which the Michigan Court of Appeals rejected the argument that a denomination was estopped from asserting an implied trust in church property because it earlier had permitted the local church to sell a house that had been similarly held. 148 Mich. App. 105, 384 N.W.2d at 95-96. The Petition for Certiorari (at 8 n.3) explains why such evidence is inappropriate: it employs a court's notion of "consistency" to question the validity of a religious body's beliefs, when in fact there may (as there were here) be numerous reasons, doctrinal and practical, why a higher body chooses to exercise its ultimate control over church property in one case but not in another.

be observed. Surely, if the decision in this case is allowed to stand, hierarchical churches will be at a loss to know how they can protect their rights in local church property if statements as clear as these can be disregarded by lower courts.

CONCLUSION

Amici urge that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST

James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The Presbyterian Church (U.S.A.) is vitally interested in protecting the free exercise of religious practice with regard to church property issues. The case law set out in this brief is indicative of the Presbyterian Church's long vigilance on this issue. As noted in this brief, the polity and decision making structure of the Presbyterian Church (U.S.A.) is an expression of the Church's deeply held religious convictions, tracing its origins to the first century Christian community. Presbyterian constitutional provisions deal with church property matters in the context of its theological understanding of the Unity of the Church.

In its constitution (the *Book of Order*), the Presbyterian Church (U.S.A.) follows exactly the same process in making decisions involving property as it does in the decisions about ordination, placement of ministers in the pulpit, and in dealing with religious doctrine. This truth was recently reaffirmed in *God Alone is Lord of the Conscience*, a Policy Statement adopted by the 200th General

Assembly of the Presbyterian Church (U.S.A.) in 1988 (at p. 17). The Assembly said: "Internal disputes within churches, including disputes over church property, should be decided by the highest ecclesiastical authority recognized by both sides before the dispute arose." The Supreme Judicial Court of Massachusetts has intruded into this ecclesiastical realm. Such confusion requires this Court's careful attention.

The **National Council of Churches of Christ in the U.S.A.** is a community of thirty-two national religious communions having an aggregate membership of around 40,000,000 in the United States. Its policies are determined by a General Board of 250 members selected by the member communions in proportion to their size and support of the Council. The Council has entered friend-of-the-court briefs in over 130 cases involving issues of ethics, morality and/or religious or civil liberty based on the policies set by the Board. The Council includes bodies of both congregational and hierarchical polity. It has long affirmed the right of its member communions – and all other religious bodies – to determine their own internal affairs as they deem best, choosing their own locus for the exercise of authority, whether local, regional, national or global, free from intervention by civil powers. That authority includes the ability to control the use of their property for the purposes of the religious body, free from alienation by judicial fiat.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins the accompanying brief because it believes and has long taught that freedom of

conscience must include not only the right to believe but also the right to express, advocate and bear witness to belief and that governmental neutrality towards religion is in the best interest of both religion and government, and of society at large.

Christian Legal Society, founded in 1961, is a non-profit ecumenical professional association of over 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious autonomy, speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right

sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority on church autonomy.